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In the

Supreme Court of the United States

October Term, 1961

No. 833

FREDERICK C. REICHERT,
Petitioner,

vs.

BOROUGH OF SCHUYLKILL HAVEN,
Respondent.

BRIEF OF RESPONDENT

CALVIN J. FRIEDBERG, ESQ.,
Schuylkill Trust Building,
Pottsville, Penna.,
Attorney for Respondent.

H. G. STUTZMAN, ESQ.,
Schuylkill Trust Building,
Pottsville, Penna.
Of Counsel.

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STATEMENT OF THE CASE

The Borough of Schuylkill Haven, a municipal corporation, of the County of Schuylkill and Commonwealth of Pennsylvania, started an action against Oscar R. Bolton and Lilly Bolton in the Court of Common Pleas of Schuylkill County to No. 654, September Term 1954, to collect a penalty for failure to connect their premises to a sanitary sewer system in violation of Borough Ordinance No. 321. The case proceeded to trial, and judgment was entered in favor of the Borough and against the defendants. A motion for a new trial and for judgment n.o.v. was refused, whereupon the defendants, Bolton, appealed to the Superior Court of Pennsylvania, which unanimously affirmed the judgment (Borough of Schuylkill Haven v. Bolton, 190 Pa. Superior Ct. 157). Thereafter, the defendants filed four petitions for allocatur to the Supreme Court of Pennsylvania, all of which were refused, and on appeal to this Honorable Court entered to No. 691 October Term, 1960, the appeal was dismissed and a certiorari denied on April 17, 1961.

The record was returned to the Court of Common Pleas of Schuylkill County and on April 17, 1961, the defendants, Oscar R. Bolton and Lilly Bolton, filed their petition to the local court and obtained a rule to show cause why the judgment should not be vacated. The rule contained the following stay order:

"All proceedings in this and other cases involving the Schuylkill Haven Sewer Ordinance

in which the same questions of law are involved, to stay in the meanwhile."

That rule is not disposed of. The petition and rule is appended hereto as Appendix "A."

In August, 1961, a summons was issued by a Justice of the Peace on affidavit of the Borough of Schuylkill Haven which was served on Frederick C. Reichert, directing him to appear for a hearing before the Justice of the Peace on August 8, 1961, to answer the charge of the Borough of Schuylkill Haven claiming a penalty under Ordinance No. 321 for failing to connect his premises to the sanitary sewer system.

On August 7, 1961, Frederick C. Reichert filed his petition in the Court of Common Pleas under the caption of the case of "Borough of Schuylkill Haven vs. Oscar R. Bolton and Lilly Bolton, 654 September Term, 1954," and was granted a rule to show cause why the proceedings initiated against him by the Borough should not be stayed. A copy of the petition and rule for a stay order is appended hereto as Appendix "B."

The next day, August 8, 1961, the Motion Court Judge who had granted the stay order the previous day, vacated the same on the grounds that the Court had no jurisdiction to allow the stay order in the first place because Mr. Reichert, the petitioner, was not a party to the proceedings under which the stay order was obtained. A copy of the order of vacation is appended hereto as Appendix "C."

Mr. Reichert appealed the vacation of the stay order to the Supreme Court of Pennsylvania and the Borough of Schuylkill Haven filed a petition to dismiss the appeal on the grounds that the order appealed from was not a final judgment, and on January 2, 1962, the appeal was quashed. On February 6, 1962, the Supreme Court of Pennsylvania denied a further petition for a request for a reconsideration of the previous order quashing the appeal.

It should be noted that the petitioner, Frederick C. Reichert, did not intervene in the case of the Borough of Schuylkill Haven, vs. Bolton, et al, supra. His particular case rests not upon a final judgment since proceedings were initiated by summons before a Justice of the Peace and his case has not been disposed of by that officer nor by any court.

ARGUMENT

I.

CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO FEDERAL QUESTION INVOLVED SINCE (a) THE SAME IS BASED ON AN INTERLOCUTORY ORDER AND NOT ON A FINAL JUDGMENT.

The order of the Court of Common Pleas of Schuylkill County appealed from was an order vacating its previous order which stayed proceedings then pending before a Justice of the Peace of the Borough of Schuylkill Haven against Frederick C. Reichert. Those proceedings have not been concluded and no final judgment has been obtained thereon. The vacation of the previous stay order is not a final determination of the new suit instituted against petitioner-appellant by the Borough. It is merely a determination that the borough may proceed with its litigation pending against him before the Justice of the Peace. The petitioner-appellant has lost no rights insofar as a defense to the action instituted against him is concerned and his right of appeal to the Court of Common Pleas and the appellate courts of Pennsylvania in the event of an adverse judgment have not been denied him by the vacation of the stay order. In order to be reviewable there must be a final judgment or order which leaves nothing to be done but to enforce the judgment. **STADLER v. MT. OLIVER**, 373 Pa. 316; **LEWIS v. E. I.DuPONT de**

NEMOURS & CO., 183 Fed. 2d. 29; **JUNG v. K. & D. MINING CO.**, 356 U. S. 335.

The order appealed from is interlocutory because it does not dispose of the subject matter of the litigation pending against petitioner-appellant because no final judgment has been obtained. **U. S. v. HOWE**, 280 Fed. 845 (Writ of Certiorari denied, 259 U. S. 587).

There is no question of due process of law fairly arising from the proceedings. Petitioner-appellant has not been denied his right to have his case litigated. The order of vacation of the stay order is nothing more than a direction to him that the case against him before the Justice of the Peace should be proceeded with. To reverse the vacation of the stay order will constitute a reinstatement of the stay order and will result in a virtual injunction, without hearing, against the Borough, preventing it from enforcing its ordinances against all non-complying property owners.

Certiorari should therefore be denied because the same is not based upon a final judgment or order and is interlocutory only.

II.

CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO FEDERAL QUESTION INVOLVED SINCE (b) THE PETITIONER-APPELLANT IS NOT A PARTY TO THE CAPTIONED CASE APPEALED FROM.

The first stay order was granted to Oscar R. Bolton and Lilly Bolton in the Court of Common Pleas of Schuylkill County entered to No. 654, September Term, 1954 (Appendix "A") wherein they requested the lower court to vacate the judgment entered against them which had been affirmed by the appellate courts of Pennsylvania and on appeal to the Supreme Court of the United States a writ of certiorari was denied.

The petitioner-appellant herein was not a party to that suit nor did he present a petition to intervene, a procedural prerequisite to his becoming a party. He is a mere intruder in that case without any legal right to interpose himself as a party. He was sued in an independent action by the Borough of Schuylkill Haven for failure to connect his premises to the sanitary sewer system of the Borough in violation of Ordinance No. 321. Oscar R. Bolton and his wife were not parties to the new suit instituted against Mr. Reichert and neither was Mr. Reichert a party to the suit of the Borough of Schuylkill Haven v. Oscar R. Bolton and Lilly Bolton. The petitioner-appellant is therefore attempting to merge the suit

pending against him before a Justice of the Peace with the case which has already proceeded to final judgment. He is not within that class intended to be protected by the order of the Court of Common Pleas of Schuylkill County of April 17, 1961.

It is also significant to note that the caption of the present appeal is "Frederick C. Reichert, Petitioner-Appellant, v. Borough of Schuylkill Haven, Respondent," whereas the caption in the Court of Common Pleas to which the petitioner filed his appeal was "Borough of Schuylkill Haven, Plaintiff, v. Oscar Bolton and Lilly Bolton" See Appendix "B". In the Supreme Court of Pennsylvania the appeal was captioned "Borough of Schuylkill Haven v. Oscar R. Bolton and Lilly Bolton, Fred C. Reichert, Petitioner-Appellant." The reason for the change is obvious. The petitioner in the court below was not a party to the suit instituted by the Borough against Mr. and Mrs. Bolton and petitioner therefore altered the original caption on appeal to the Supreme Court of Pennsylvania and still altered it further in his appeal to the Supreme Court of the United States in order to give the outward appearance that he is the original party and not Mr. and Mrs. Bolton. He evidently resorted to this device because the case against him before the Justice of the Peace was not appealed to the Court of Common Pleas and he could therefore not obtain a stay order, but would have been compelled instead to seek a preliminary injunction which would probably have been denied.

Argument

There appears to be little doubt that the objective of petitioner-appellant was dilatory, designed to delay the Borough in its suit against him. The lower court, upon further consideration of its order detected the procedural defect and vacated the order because he was not a party to the suit to which he had captioned his case.

Certiorari should therefore be denied because the appellant is not a party to the case captioned in the proceedings in the courts below.

CONCLUSION

There is no Federal question involved and the Supreme Court of the United States is without jurisdiction to hear the appeal because the order of the court below appealed from is not final and conclusive, but is interlocutory only.

Certiorari should be denied for the further reason that the petitioner-appellant is not a party to the suit captioned in the court below.

Respectfully submitted.

CALVIN J. FRIEDBERG, ESQ.
Schuylkill Trust Building.
Pottsville, Penna.
Attorney for Respondent.

H. G. STUTZMAN, ESQ.
Schuylkill Trust Building.
Pottsville, Penna.
Of Counsel.

APPENDIX "A"

IN THE COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY

Borough of Schuylkill Haven
Plaintiff

Oscar E. Bolton and
Lilly Bolton
Defendants

No. 651
September
Term
1954

Petition to Vacate Proceedings and Judgment

To the Honorable the Judges of the Said Court

The petition of the above named defendants by their attorney, Ralph M. Bashore, Esq., respectfully represents:

1. On October 31, 1955 defendants petitioned your Honorable Court to dismiss the complaint in the above entitled action for want of jurisdiction in this Court of the subject matter of said complaint.

2. A rule to show cause was granted upon the plaintiff and thereafter the matter was duly argued before your Honorable Court.

3. On February 20, 1956, your Honorable Court speaking through Palmer, P. J., granted the prayer of the petition and entered a final Order and Judgment dismissing the complaint for want

of jurisdiction in this Court of the subject matter of the complaint.

4. On February 21, 1956, plaintiff appealed from said final order and Judgment to the Superior Court of Pennsylvania at No. 140 October Term, 1956.

5. On July 17, 1956, the Superior Court of Pennsylvania entered an Order purporting to reverse the Order entered by this Court.

6. The Superior Court of Pennsylvania had no jurisdiction of the subject matter of the appeal, as hereinafter more fully appears, and its Order of July 17, 1956, purporting to reverse the Order of this Court, was a nullity in law and without binding legal force or effect.

7. Thereafter, pursuant to the supposed authority of the Superior Court's Order, the case proceeded to trial in this Court and resulted in a Judgment entered on January 29, 1959, in favor of the plaintiff and against the defendants.

8. Defendants appealed from said Judgment of January 29, 1959 to the Superior Court of Pennsylvania at No. 192 October Term, 1959.

9. On August 10, 1959, the Superior Court entered an Order purporting to affirm the Judgment of this Court entered on January 29, 1959.

10. The Superior Court had no jurisdiction of the subject matter of the appeal, as hereinafter

more fully appears, and its Order of August 10, 1959, purporting to affirm the judgment entered by this Court on January 29, 1959, was a nullity in law and without binding legal force or effect.

11. Thereafter, on December 30, 1959, the Superior Court definitively ruled in MATEY APPEAL, 191 Pa. Superior Ct. 391, that the Legislature had not given the Superior Court jurisdiction to entertain appeals from jurisdictional orders of the trial court in cases wherein the Superior Court had not been given a right of review by appeal from a final judgment.

12. Thereafter, on January 11, 1960, the Superior Court further definitively ruled in COM. v. HANZELIK, 191 Pa. Superior Ct. 460, that it did not have, and never did have jurisdiction to entertain appeals in actions to recover a penalty for alleged breach of a municipal ordinance.

13. The present action, being an action to recover a penalty for alleged violation of a municipal ordinance, is within the class of cases whereof the Superior Court does not and never did have jurisdiction.

14. By reason of the Superior Court's lack of jurisdiction, the Order entered by this Court on February 20, 1956, dismissing the complaint for want of jurisdiction of the subject matter, stands unreversed by any appellate court having power to review it, and said Order of February 20, 1956, is in full force and legal effect.

15. The Order of this Court, entered on February 20, 1956, dismissing the complaint for want of jurisdiction of the subject matter, is res adjudicata as to the lack of jurisdiction in this Court over the subject matter of the complaint.

16. The proceedings had in this Court subsequent to the Order of February 20, 1956, were irregular and void for want of jurisdiction in this Court; and the judgment subsequently entered in favor of the plaintiff on January 29, 1960, was also irregular and void for want of jurisdiction in this Court to enter it.

WHEREFORE, defendants move your Honorable Court to grant a rule upon the Borough of Schuylkill Haven, plaintiff herein, to show cause why the proceedings in this Court subsequent to February 20, 1956, should not be vacated and why the judgment entered on January 29, 1960, should not be vacated.

And they will ever pray, etc.

RALPH M. BASHORE.
RALPH M. BASHORE.
Attorneys for Defendants.

STATE OF PENNSYLVANIA,
COUNTY OF SCHUYLKILL, ss:

RALPH M. BASHORE, being duly sworn according to law, deposes and says that he is one of the attorneys for defendants; that he is authorized to and does make this affidavit on their behalf.

and that the facts set forth in the foregoing petition which are within his personal knowledge are true, and as to facts based upon information of others, he believes them to be true.

s/ RALPH M. BASHORE.
RALPH M. BASHORE.
Attorney for Defendants

Sworn and subscribed to before me this 17th day of April A. D. 1961.

s/ C. RYLAND LORD.
SEAL 1st Monday of January, 1961.

RULE TO SHOW CAUSE

And Now, this 17th day of April, 1961, upon motion of Ralph M. Bashore, Esq., attorney for defendants, a rule is granted upon the Borough of Schuylkill Haven, plaintiff herein, to show cause why all of the proceedings had in this Court in the above entitled case subsequent to February 20, 1956, should not be vacated and why the judgment entered on January 29, 1959 should not be vacated.

All proceedings in this and other cases involving the Schuylkill Haven sewer ordinances in which the same questions of law are involved to stay in the meanwhile.

Rule returnable May 22, 1961.

By the Court,

s/ CURRAN, J.

APPENDIX "B"

IN THE COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY

Borough of Schuylkill Haven.
Plaintiff.

vs.

Oscar R. Bolton and
Lilly Bolton.
Defendants.

No. 654
September
Term.
1954

Petition and Rule

To the Honorable, the Judges of the Said Court:

The petition of the undersigned respectfully represents:

1. On April 17, 1961, your Honorable Court entered an Order in the above entitled proceeding which reads, in part, as follows:

"All proceedings in this and other cases involving the Schuylkill Haven sewer ordinances in which the same questions of law are involved, to stay in the meanwhile."

2. Said Order of April 17, 1961, is still in full force and effect.

3. Notwithstanding said Order of April 17, 1961, the Borough of Schuylkill Haven did, on and since August 1, 1961, institute actions before

Appendix "E"

Justice of the Peace John H. Reber, against petitioner and other property owners charging them with violation of Sewer Ordinance No. 321.

4. Said Ordinance No. 321 was never transcribed into or recorded in the Ordinance Book of the Borough within one month after its passage nor at any time thereafter. Said Ordinance No. 321 therefore never came into force and effect and is wholly invalid.

WHEREFORE, your petitioner prays that a rule be granted upon the Borough of Schuylkill Haven and Justice of the Peace, John H. Reber, to show cause why the actions instituted before Justice John H. Reber against your petitioner and other property owners should not be decreed violative of the above Order of Court and why said actions should not be ordered discontinued and vacated.

And he will ever, pray, etc.

s. FREDERICK C. REICHERT
FREDERICK C. REICHERT,
Petitioner.

s. RALPH M. BASHORE
RALPH M. BASHORE,
Attorney for Petitioner.

STATE OF PENNSYLVANIA,
COUNTY OF SCHUYLKILL, ss:

FREDERICK C. REICHERT, being duly sworn ac-

cording to law, deposes and says that the facts set forth in the foregoing petition which are within his personal knowledge are true, and as to facts based upon information of others he believes them to be true.

s FREDERICK C. REICHERT
FREDERICK C. REICHERT,
Petitioner.

Sworn to and subscribed before me this 4th day of August, A. D. 1961.

s GEORGE I. BENSINGER,
Notary Public,
Schuylkill Haven, Pa.

SEAL

My commission expires Feb. 1, 1963

IN THE COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY

Borough of Schuylkill Haven,
Plaintiff.

vs.

Oscar R. Bolton and
Lilly Bolton,
Defendants.

No. 654
September
Term,
1954

RULE TO SHOW CAUSE

AND NOW, this 7th day of August, 1961, upon motion of Ralph M. Bashore, Esq., Attorney for petitioner, a rule is granted on the Borough of Schuylkill Haven and Justice of the Peace John

Appendix "B"

H. Reber to show cause why the actions instituted before Justice John H. Reber against petitioner and other property owners should not be decreed violative of the Order of this Court of April 17, 1961, and why said actions should not be ordered to be discontinued and vacated.

All proceedings against petitioner and other property owners to stay in the meanwhile.

Rule returnable the 21st day of August, 1961.

By the Court,

s PAUL, J.

APPENDIX "C"

IN THE COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY, PENNA.

Borough of Schuylkill Haven,
Plaintiff.

vs.

Oscar R. Bolton and
Lilly Bolton,
Defendants.

No. 654
September
Term,
1954

Order of Court

PAUL, J.

On Monday morning, August 7, 1961, in Motion Court, a Petition was presented to the writer for a Rule to Show Cause. The Rule to Show Cause had the same caption as the petition. The writer, when he signed the Rule to Show Cause, did not read the petition. Later in the day when he examined the petition he found that he had no jurisdiction to grant the Rule to Show Cause. The petitioner is neither Oscar R. Bolton nor Lilly Bolton, the defendants in the above case. The petitioner is Frederick C. Reichert. The affidavit to the petition was also taken by Frederick C. Reichert, who is not a party defendant in the above captioned case. The Court therefore had no jurisdiction to grant the Rule to Show Cause.

Appendix "C"

AND NOW, this 8 day of August, 1961, the Rule to Show Cause in above captioned case signed on August 7, 1961, is hereby vacated.

By the Court,

PAUL, J.